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Supreme Court No. _____
COA No. 62862-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TYRONE GRESHAM,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Michael Tyrone Gresham requests this Court grant review pursuant to RAP 13.4 of the published decision of the Court of Appeals in State v. Gresham, No. 62862-3-I, filed December 21, 2009. A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. RCW 10.58.090 allows courts to admit evidence of prior sexual misconduct in sex offense prosecutions in order to prove a person's propensity to commit the crime. The evidence rules and centuries of common law categorically forbid the admission of such evidence. Does the statute therefore conflict with the evidence rules and violate the constitutional separation of powers doctrine?

2. RCW 10.58.090 alters the rules of evidence in a manner that benefits only the prosecution and permits courts to consider the "necessity" of the evidence by weighing the strength of the State's other evidence of guilt. Does the statute in effect lower the quantum of evidence necessary to obtain a conviction and violate the federal ex post facto clause as applied in this case?

3. Should Washington's ex post facto clause be interpreted independently of the federal clause? Does RCW 10.58.090 violate Washington's broader ex post facto clause as applied in this case?

C. STATEMENT OF THE CASE

The State charged Michael Gresham with four counts of child molestation in the first degree.[1] CP 127-28. The offenses allegedly occurred between December 1, 1998, and September 5, 2002. CP 127-28.

Prior to trial, the State moved to admit evidence, pursuant to RCW 10.58.090 and ER 404(b), that Mr. Gresham had previously committed other sex offenses. RCW 10.58.090 permits the court to admit, in a criminal action in which the defendant is accused of a sex offense, "evidence of the defendant's commission of another sex offense or sex offenses . . . notwithstanding Evidence Rule 404(b)." RCW 10.58.090(1). The statute took effect on June 12, 2008. Laws 2008, ch. 90, § 2. Thus, the statute took effect after the alleged offenses but before the trial in this case.

The State sought to admit evidence that, in 1992, Mr. Gresham had raped a nine-year-old girl on two occasions. 10/21/08RP 29. Mr. Gresham had pled guilty to one count of second degree assault with sexual motivation for the offenses. 10/21/08RP 16.

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[1] Mr. Gresham was originally charged with six counts of child molestation in the first degree, but the State later dismissed two of the counts.

The trial court found the evidence of Mr. Gresham's prior sex offenses was *not* admissible under ER 404(b). CP 4-15. The court found that the prior and current individual molestations were not part of a "common scheme or plan," and that the evidence fell under no other exception to ER 404(b)'s ban on propensity evidence. CP 9-11. But the court found the evidence was admissible pursuant to RCW 10.58.090. In particular, the court found the evidence was "necessary" to the State, because "evidence of the prior acts is the only form of evidence that could corroborate testimony of the current victim." CP 13-14.

At the jury trial, J.L. testified about the current allegations. 11/04/08RP 127-57. A.C. testified about the prior alleged sex offenses. 11/04/08RP 215-28. The jury found Mr. Gresham guilty as charged of three counts of first degree child molestation and, for the fourth count, guilty of the lesser-included offense of attempted first degree child molestation. CP 39. At sentencing, the court found Mr. Gresham was a "two-strike" offender and imposed a sentence of life without parole. CP 41, 45; 1/08/09RP 513-14.

Mr. Gresham appealed, arguing RCW 10.58.090 violates the constitutional separation of powers doctrine, because it expressly conflicts with the evidence rules. Mr. Gresham also argued the

statute violated both the federal and state constitutional ex post facto clauses as applied in this case, because it alters the rules of evidence in a manner that benefits only the prosecution and permits courts to weigh the strength of the State's other evidence of guilt in determining admissibility. Mr. Gresham provided a "Gunwall[2]" analysis and argued the state constitutional ex post facto clause should be interpreted independently of the federal clause and provide broader protection in this case.

The Court of Appeals affirmed. The court acknowledged the statute on its face conflicts with ER 404(b), but concluded the statute can be "harmonized" with the rule because it permits but does not require courts to admit the evidence. Slip Op. at 8-9. The court also concluded the statute violated neither the state nor the federal ex post facto clause, because it does not alter the degree of proof required for a sex offense conviction. Slip Op. at 10-14. The court did not analyze the state ex post facto clause independently of the federal clause but held without explanation that "the two provisions are coextensive." Slip Op. at 10.

The facts as set forth more fully in Mr. Gresham's pleadings are incorporated herein.

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[2]. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).,

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. WHETHER RCW 10.58.090 VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

RCW 10.58.090 overturns centuries of common law by allowing trial courts to admit evidence of prior sexual misconduct for the purpose of proving a person's propensity to commit the crime. The statute also allows courts to admit evidence that ER 404(b) categorically forbids. Whether the statute irreconcilably conflicts with the evidence rules and violates the separation of powers doctrine presents a significant question of constitutional law and an issue of substantial public interest, warranting review by this Court. RAP 13.4(b)(3), (4). In addition, the Court of Appeals opinion upholding the statute conflicts with this Court's opinion in Fircrest v. Jensen, 158 Wn.2d 384, 143 P.3d 776 (2006), and other cases, which hold that a statute in conflict with the evidence rules violates the constitutional separation of powers doctrine. RAP 13.4(b)(1).

RCW 10.58.090[3] permits trial courts to admit, in criminal actions in which the defendant is accused of a sex offense, "evidence of the defendant's commission of another sex offense or

sex offenses . . . *notwithstanding Evidence Rule 404(b)*." RCW 10.58.090(1) (emphasis added). The statute directs courts to consider evidence of other sexual offenses in sexual misconduct prosecutions for any purpose. RCW 10.58.090. By its express terms, the statute conflicts with ER 404(b), which categorically bans the admission of prior misconduct evidence for the purpose of "prov[ing] the character of a person in order to show action in conformity therewith." ER 404(b). Because RCW 10.58.090 directly conflicts with the evidence rules, it usurps this Court's constitutional authority to govern the procedures of Washington courts and violates the constitutional separation of powers doctrine.

This Court has inherent power to govern court procedures, stemming from article 4 of the state constitution. Jensen, 158 Wn.2d at 394; State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); Const. art. 4, § 1. The Court also has power delegated by the Legislature to adopt rules of procedure. Jensen, 158 Wn.2d at 394; Fields, 85 Wn.2d at 129; RCW 2.04.190.

In Washington, this Court's authority to prescribe procedural rules takes precedence over the Legislature's. State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County, 148 Wash.

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[3] A copy of the statute is attached as Appendix B.

1, 4, 9, 267 P. 770 (1928); The Rule-Making Power of the Courts, 1 Wash. L. Rev. 163, 175, 228 (1925); RCW 2.04.200 ("When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect."); State v. Williams, 156 Wash. 6, 7, 286 P. 65 (1930) (RCW 2.04.090 and RCW 2.04.200 abrogated pre-existing statutes in conflict with the court's new rules).

The Evidence Rules fall within the court's constitutional and statutory authority to govern matters of procedure. Jensen, 158 Wn.2d at 394; see also ER 101 ("These rules govern proceedings in the courts of the state of Washington to the extent and with the exceptions stated in rule 1101."). Rules of evidence fall within the Court's ultimate authority because they "'pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.'" Jensen, 158 Wn.2d at 394 (quoting State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974)). Rules of evidence generally "strike at the very heart of a court's exercise of judicial power," in that they govern "the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved." State v. Mallard, 40 S.W.3d 473, 483 (Tenn. 2001).

Pursuant to the Court's supreme authority over matters of procedure, the Evidence Rules take precedence over statutes that are directly in conflict. See Jensen, 158 Wn.2d 384 (statute allowing admission of BAC test results in certain cases did not violate the separation of powers doctrine, because it did not permit the admission of evidence that the evidence rules otherwise forbade); State v. Saldano, 36 Wn. App. 344, 675 P.2d 1231 (1984) (statute allowing admission of an accused's prior convictions to attack his credibility *whenever* he testified on his own behalf conflicted with and was superseded by ER 609, which permits admission of prior conviction evidence to attack defendant's credibility only if certain requirements are met); State v. Ryan, 103 Wn.2d 165, 178-79, 691 P.2d 197 (1984) (child hearsay statute does not violate separation of powers doctrine, because "[l]egislative enactment of hearsay exceptions is specifically contemplated by the Rules of Evidence[4]").

The Court of Appeals held that RCW 10.58.090 does not conflict with ER 404(b), because the statute does not *require* the trial court to admit evidence of a defendant's prior sexual

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[4] "ER 802 states: 'Hearsay is not admissible except as provided by these rules, by other court rules, or *by statute*.'" Ryan, 103 Wn.2d at 178 (emphasis in Ryan).

misconduct. Instead, the evidence is admissible only if the court finds, using the balancing test of ER 403, that the probative value of the evidence outweighs its potential prejudicial impact. Slip Op. at 8-9. But it is undisputable that the statute permits the court to admit evidence that would otherwise be inadmissible under ER 404(b). By its express terms, the statute directly conflicts with ER 404(b). The only way the statute could be harmonized with the court rule is if it could be read to preclude admission of prior misconduct evidence for the purpose of proving the defendant's character or propensity to commit the crime. Because the statute cannot be read in such a manner, it directly conflicts with the evidence rules and violates the separation of powers doctrine.

Although the Court of Appeals relied on this Court's opinion in Jensen, 158 Wn.2d 384, the Court of Appeals' opinion *conflicts* with Jensen. The statute at issue in Jensen did not permit the admission of evidence that the evidence rules otherwise forbade. 158 Wn.2d at 399. Instead, admissibility was subject to the ordinary rules of evidence. Id. Here, by contrast, RCW 10.58.090 permits the admission of evidence that ER 404(b) categorically forbids.

Although the statute requires courts to weigh the probative value of the prior offense evidence against the danger of unfair prejudice, using the analysis provided in ER 403, see RCW 10.58.090(1), (6)(g), the statute usurps the Court's constitutional authority to ban propensity evidence outright. ER 404(b) reflects the judiciary's long-standing judgment that the relevance of propensity evidence is simply too attenuated, and its potential for prejudice too great, to be allowed in any prosecution. Indeed, the ban on propensity evidence has been firmly and historically established in the common law since at least the seventeenth century in England and, as evidenced in case law and state and federal codes of evidence, has had continuing validity to the present. Louis M. Natali, Jr. & R. Stephen Stigall, Are You Going to Arraign His Whole Life? How Sexual Propensity Evidence Violates the Due Process Clause, 28 Loy. U. Chi. L.J. 1, 14 (1996); 1A John H. Wigmore, Wigmore on Evidence, § 58.2, at 1213 (noting ban on propensity evidence received judicial sanction for three centuries).

ER 404(b) reflects the traditional common law rule that a person's prior crimes, wrongs, or acts are inadmissible to demonstrate the person's character or general propensities. 5 Tegland, Washington Practice, supra, § 404.9, at 497. Because

RCW 10.58.090 permits the admission of evidence that ER 404(b) otherwise prohibits, it directly conflicts with the rule and violates the separation of powers doctrine.

2. WHETHER RCW 10.58.090 VIOLATES THE FEDERAL EX POST FACTO CLAUSE IS A SIGNIFICANT QUESTION OF FEDERAL CONSTITUTIONAL LAW AND AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE

RCW 10.58.090 allows the State to rely upon highly incriminating evidence of a defendant's past sexual misconduct, which would otherwise be inadmissible, in order to convict him of a current sexual offense. The Legislature's intent in enacting the statute was to facilitate sex offense prosecutions. Moreover, the statute permits courts to consider, in deciding whether to admit the prior offense evidence, the "necessity" for the evidence in light of the State's other evidence of guilt. RCW 10.58.090(6)(e). In these ways, the statute effectively alters the standard of proof required to convict a person of a sex offense and violates the federal ex post facto clause.

Article 1, section 10 of the United States Constitution provides, "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts."

The test for determining whether a statutory enactment may be applied in a prosecution for conduct that occurred before its enactment, is set forth in Calder v. Bull, 3 U.S. 386, 1 L.Ed. 648 (1798). Ludvigsen v. Seattle, 162 Wn.2d 660, 668, 174 P.3d 43 (2007). A law that "change[s] the rules of evidence, for the purpose of conviction," violates the federal Ex post facto clause. Calder, 3 U.S. at 391.

The Court of Appeals held RCW 10.58.090 does not violate the federal ex post facto clause, because it "does not alter the facts necessary to establish guilt, and it leaves unaltered the degree of proof required for a sex offense conviction." Slip Op. at 13-14. The court relied upon Carmell v. Texas, 529 U.S. 513, 525, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) and Ludvigsen v. Seattle, 162 Wn.2d 660, 174 P.3d 43 (2007).

The statute at issue in this case has the same effect on sex abuse prosecutions as the statutes at issue in Carmell and Ludvigsen had on the prosecutions in those cases. The statute lowers the quantum of evidence necessary to convict a defendant in a class of cases by lowering the requirements for admitting highly prejudicial prior sexual misconduct evidence in sex offense prosecutions. The Legislature's purpose in enacting the statute

was to facilitate sex abuse prosecutions, which previously often depended on the victim's testimony alone. Testimony at the Senate Hearing states: "ER 404(b) should be changed as it applies to trials of sex offenses," because juries in such cases too often are unable to reach a verdict. S.B. Rep., 2008 Reg. Sess. S.B. 6933. Further, the statute directs courts to consider "the necessity of the evidence beyond the testimonies already offered at trial." RCW 10.58.090(6)(e).

Moreover, courts have recognized for centuries the unfairly prejudicial impact of prior misconduct evidence in criminal prosecutions. The ban on the admission of propensity evidence is firmly rooted in the common law and exists today in ER 404(b). There should be no question that RCW 10.58.090 facilitates convictions by allowing the State to rely on highly prejudicial evidence that would otherwise be excluded. The purpose and effect of the statute is to overcome deficiencies of proof common to sex offense prosecutions and make conviction more easy.

The statutes at issue in Carmell and Ludvigsen fell squarely within the fourth Calder category, but RCW 10.58.090 also falls within its scope. The statute "alters the legal rules of evidence, and receives less, or different testimony, than the law required at the

time of the commission of the offence, in order to convict the offender." Calder, 3 U.S. at 390-91.

The Court of Appeals held RCW 10.58.090 is like the evidence statute at issue in State v. Clevenger, 69 Wn.2d 136, 417 P.2d 626 (1966). Slip Op. at 13-14. But that is not the case. In Clevenger, the statute removed the marital privilege in a criminal prosecution. Id. at 140. The change permitted different testimony that was not inherently beneficial to the State. In contrast, RCW 10.58.090 is "inherently beneficial to the State." Ludvigsen, 162 Wn.2d at 672. It is therefore ex post facto as applied in this case.

Any simple distinction between rules affecting admissibility or competency of evidence and rules affecting the amount or degree of proof required for conviction "neglect[] the practical relationship between rules of admissibility and standards of proof." 1 John H. Wigmore, Evidence in Trials at Common Law, § 7, at 468 n.4 (Tillers rev. ed. 1983). A statute that alters the rules of evidence for the purpose of supplying a deficiency of legal proof for a class of crime, in order to convict offenders, may not be applied to crimes pre-dating its enactment. Calder, 3 U.S. at 389, 390-91. Such a statute effectively alters the State's burden of proof.

3. WHETHER RCW 10.58.090 VIOLATES THE STATE CONSTITUTIONAL EX POST FACTO CLAUSE IS A SIGNIFICANT QUESTION OF STATE CONSTITUTIONAL LAW AND AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE

Mr. Gresham argued Washington's ex post facto clause should be interpreted independently of the federal clause to provide broader protection in this case. Mr. Gresham provided a Gunwall[5] analysis in support. But the Court of Appeals did not analyze the state clause separately and concluded, without explanation, that "the two provisions are coextensive." Slip Op. at 10. No Washington case has concluded the state constitutional ex post facto clause provides broader protection than the federal clause but, to Mr. Gresham's knowledge, no litigant has presented a Gunwall analysis of the state constitutional provision. Whether the state provision should be interpreted independently of the federal clause, and whether it provides broader protection to invalidate application of the statute in this case, are significant questions of state constitutional law and issues of substantial public interest. Review is therefore warranted. RAP 13.4(b)(3), (4).

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[5] The six non-exclusive Gunwall factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal

RCW 10.58.090 plainly alters the rules of evidence, permitting different evidence than was earlier allowed, in order to make conviction in a sex offense prosecution more likely. This Court should interpret the Washington Constitution's ex post facto clause as applying to evidence statutes such as RCW 10.58.090, which ""retrench the rules of evidence, so as to make conviction more easy."" State v. Fugate, 332 Or. 195, 211, 26 P.3d 802 (2001) (quoting State v. Cookman, 324 Or. 19, 28, 920 P.2d 1086 (1996) (quoting Strong v. State, 1 Blackf. 193, 196 (Ind. 1822))).

a. *Gunwall* analysis.

i. Factors one and two—textual language of the Washington Constitution and significant differences between the state and federal ex post facto clauses. The Washington Constitution ex post facto prohibition provides: "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. 1, § 23. Article 1, section 10 of the United States Constitution provides, "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts." Although the language of the two provisions is

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and state constitutions; and (6) matters of particular state interest or local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

similar, use of the word "ever" in the state provision suggests an emphatic intent by the Founders to forbid ex post facto laws.

Moreover, the federal clause explicitly bans state ex post facto laws, which supports the position that Washington's provision affords different protection. Otherwise, the state clause would be superfluous, violating well-established rules of construction. Neil C. McCabe, Ex Post Facto Provisions of State Constitutions, 4 Emerging Issues St. Const. L. 133, 156 (1991).

ii. Pre-existing state law. Very few cases addressing the ex post facto prohibition pre-date the adoption of the Washington Constitution. In Fox v. Territory, 2 Wash. Terr. 297, 300, 5 P. 603 (1884), this Court held the federal ex post facto clause prohibited retroactive application of laws that are "directed at particular classes, prescribing additional penalties for acts before that declared crimes, rendering punishable acts not before criminal, and changing the rules of evidence by which less or different testimony was made sufficient to convict." Id. at 300.

iii. History of constitutional provision. The delegates at the Washington constitutional convention borrowed the language in Section 23 from the California and Oregon Constitutions, the Hill draft, and the federal Constitution. Robert F.

Utter and Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 37-38 (2002). The language of the Washington provision is identical to the Oregon provision. State v. Fugate, 223 Or. 195, 210 n.5, 26 P.3d 802 (2001) (article 1, section 21, of the Oregon Constitution provides, "No *ex post facto* law . . . shall ever be passed"). The Oregon provision, in turn, was derived from the Indiana Constitution. Id. at 211.

iv. Differences in structure between the federal and state constitutions. The United States Constitution is a grant of limited power to the federal government, whereas the Washington Constitution imposes limitations on the otherwise plenary power of the state. Gunwall, 106 Wn.2d at 61. This means that, at the state level, protection from legislative power is found solely in positive constitutional affirmations of individual liberties. Clayton, Toward a Theory of the Washington Constitution, supra, at 74.

v. Matters of particular state interest. The regulation of criminal trials is a matter of particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990); Gunwall, 106 Wn.2d at 62.

vi. Common law history. Early decisions from this Court indicate the Court understood that laws altering the rules

of evidence to make conviction more easy could not be applied to crimes pre-dating their enactment. Lybarger v. State, 2 Wash. 552, 560-61, 27 P. 449 (1891). In Lybarger, the Court explained it understood the fourth Calder factor to bar "change[s in] the rules of evidence to make conviction more easy." Id. at 560-61.

This Court's early understanding of the fourth Calder category parallels the early understanding of the Oregon and Indiana courts. State v. Fugate, 332 Or. 195, 26 P.3d 802 (Or. 2001). In Fugate, the Oregon court noted that the Indiana Supreme Court had construed the meaning of its ex post facto clause as prohibiting the application of laws that "'retrench the rules of evidence, so as to make conviction more easy.'" Id. (quoting Strong v. State, 1 Blackf. 193, 196 (Ind. 1822)). In other words, "laws that alter the rules of evidence in a one-sided way that makes conviction of a defendant more likely," may not be applied to crimes committed before their enactment. Fugate, 332 Or. at 213. Because Washington's constitution was also modeled on Indiana's, the same interpretation should apply to Washington's ex post facto clause.

In Fugate, the Oregon court independently applied its state constitutional provision to a statutory amendment that barred the

exclusion of evidence obtained in violation of statute unless exclusion was otherwise required by law. Id. at 198-99. The acknowledged purpose of the Oregon law was to make criminal convictions easier. Id. at 214-15. Applying the fourth Calder category, the court held the provision violated the ex post facto clause of the Oregon Constitution because it operated retroactively and to the exclusive benefit of the prosecution. Id.

Like the law at issue in Fugate, RCW 10.58.090 operates only in favor of the prosecution. It retrenches the rules of evidence so as to make conviction more easy. It therefore violates the state ex post facto clause if applied to crimes committed before its effective date.

E. CONCLUSION

The Court of Appeals opinion presents significant questions of federal and state constitutional law and issues of substantial public importance, and conflicts with decisions from this Court. Review is therefore warranted.

Respectfully submitted this 20th day of January, 2010.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL TYRONE GRESHAM, Appellant.	)	NO. 62862-3-I DIVISION ONE PUBLISHED OPINION FILED: December 21, 2009

LEACH, J. — Michael Tyrone Gresham challenges the constitutionality of RCW 10.58.090, which addresses the admissibility of evidence of a defendant's past sex offenses in a criminal sex offense action, notwithstanding ER 404(b). At a pretrial hearing, the trial court determined that evidence of Gresham's prior sex offense was admissible under this statute. A jury subsequently found Gresham guilty of multiple counts of child molestation in the first degree. On appeal, Gresham claims (1) RCW 10.58.090 violates the separation of powers doctrine and (2) as it applied to him, violates the federal and state prohibitions against ex post facto laws. Finding no constitutional defect under either theory, we uphold the statute and affirm Gresham's conviction.

FACTS

Gresham has a history of sex offenses. In 1998 he was convicted of second degree assault with sexual motivation for molesting a nine-year-old girl in 1992. In 2008, he was arrested and charged with three counts of child molestation in the first degree and one count of attempted child molestation in the first degree for repeatedly molesting an eight-year old girl from 1998 to 2002.

During the proceedings on the child molestation charges, the trial court conducted a pretrial hearing to determine whether Gresham's 1998 assault conviction and testimony from the victim were admissible under the common scheme or plan exception to ER 404(b) or, alternatively, under RCW 10.58.090. The trial court held that this evidence was not admissible under ER 404(b) but was admissible under RCW 10.58.090.

On November 7, 2008, a jury found Gresham guilty on all four charges. On appeal, Gresham challenges the constitutionality of RCW 10.58.090.

STANDARD OF REVIEW

Constitutional challenges to legislation are questions of law we review de novo.[1] Statutes are presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt.[2]

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[1] City of Fircrest v. Jensen, 158 Wn.2d 384, 389, 143 P.3d 776 (2006).

[2] State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp., 142 Wn.2d 328, 335, 12 P.3d 134 (2000).

ANALYSIS

ER 404(b) prohibits the use of evidence of other crimes, wrongs, or acts to show action in conformity therewith but also lists other purposes for which evidence of past acts is admissible.[3] This list is not exclusive.[4]

RCW 10.58.090 states, "In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403."[5] As used in this statute the term "sex offense" includes uncharged conduct.[6] The statute identifies the following list of factors that the trial court "shall" consider to determine whether the evidence should be excluded under ER 403:

> (a) The similarity of the prior acts to the acts charged;
> (b) The closeness in time of the prior acts to the acts charged;
> (c) The frequency of the prior acts;
> (d) The presence or lack of intervening circumstances;
> (e) The necessity of the evidence beyond the testimonies already offered at trial;
> (f) Whether the prior act was a criminal conviction;
> (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
> (h) Other facts and circumstances.[7]

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[3] This list of other purposes for which past acts evidence may be admitted includes "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

[4] State v. Hepton, 113 Wn. App. 673, 688, 54 P.3d 233 (2002).

[5] RCW 10.58.090(1).

[6] RCW 10.58.090(5).

[7] RCW 10.58.090(6).

The legislature's purpose for adopting this "exception to Evidence Rule 404(b)" is to "ensure that juries receive the necessary evidence to reach a just and fair verdict."[8]

Gresham contends that RCW 10.58.090 violates the separation of powers doctrine by invading the judiciary's prerogative to promulgate rules of evidence. Alternatively, Gresham contends that RCW 10.58.090, as applied to him, violates the state and federal constitutional prohibition against ex post facto laws.

Separation of Powers

Our state constitution divides the political power of the government between three co-equal branches. Implicit in this distribution of power is the separation of powers doctrine, the purpose of which is to secure the core functions of each branch against encroachment by the other two branches.[9] The doctrine does not require that the three branches be hermetically sealed off from one another, however.[10] Some overlap is required to "maintain an effective system of checks and balances."[11] Accordingly, the test for deciding whether "one branch of government [is] aggrandizing itself or encroaching upon the 'fundamental functions' of another" is "'not whether the two branches of government engage in coinciding activities, but rather whether the activity of one

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[8] SUBSTITUTE S.B. 6933, at 412-14, 60th Leg., Reg. Sess. (Wash. 2008).
[9] State v. Moreno, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002).
[10] Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).
[11] Carrick, 125 Wn.2d at 135.

branch threatens the independence or integrity or invades the prerogatives of another.'"[12]

This case implicates shared functions of the judicial and legislative branches of government. The authority of our Supreme Court derives from article IV of our state constitution and from the legislature under RCW 2.04.190.[13] Article IV provides the judiciary with the power to promote the effective administration of justice by governing court practice and procedure.[14] "'[P]ractice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.'"[15] This includes the power to determine the admissibility of evidence.[16] RCW 2.04.190 confers on our Supreme Court the

> power to prescribe . . . the mode and manner of . . . filing proceedings and pleadings; of giving notice . . . and process of all kinds; of taking and obtaining evidence; of . . . entering . . . orders and judgments; and generally to regulate . . . by rule the forms for . . . the entire pleading, practice, and procedure to be used in all suits, actions, appeals and proceedings . . . .

(Emphasis added.) Accordingly, "[t]he adoption of the rules of evidence is a legislatively delegated power of the judiciary."[17]

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[12] Moreno, 147 Wn.2d at 505-06 (quoting Carrick, 125 Wn.2d at 135).
[13] Jensen, 158 Wn.2d at 394.
[14] Jensen, 158 Wn.2d at 394.
[15] Jensen, 158 Wn.2d at 394 (quoting State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974)).
[16] See City of Seattle v. Ludvigsen, 162 Wn.2d 660, 671, 174 P.3d 43 (2007); Kerr v. Palmieri, 325 Mass. 554, 557, 91 N.E.2d 754 (1950); Hrouda v. Winne, 112 A.D.2d 304, 305, 491 N.Y.S.2d 749 (N.Y. App. Div. 2 1985).
[17] Jensen, 158 Wn.2d at 394.

The authority of the legislature to enact evidence rules has been recognized since statehood.[18] Hence, both branches may promulgate rules of evidence. In light of this overlap, "[w]hen a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both."[19] But when rules and statutes cannot be harmonized, "the nature of the right at issue determines which one controls."[20] Thus, "[w]henever there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power, the court rule will prevail."[21]

Though Gresham and the State agree that both the judiciary and the legislature share authority to promulgate rules of evidence, Gresham asserts that RCW 10.58.090 conflicts with ER 404(b) expressly and impliedly. He claims that the statute expressly conflicts with the rule by stating it applies "notwithstanding Evidence Rule 404(b)." The implied conflict arises from the absence of any language in the statute limiting the purposes for which past acts evidence may be admitted, while ER 404(b) limits use of past acts evidence for specific purposes only, such as proof of motive, opportunity, intent, and the like. According to Gresham, this absence of any limiting language means that evidence may be admitted under RCW 10.58.090 for purposes prohibited by ER 404(b).

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[18] State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County, 148 Wash. 1, 4, 267 P. 770 (1928).

[19] Jensen, 158 Wn.2d at 394.

[20] State v. W.W., 76 Wn. App. 754, 758, 887 P.2d 914 (1995).

[21] Jensen, 158 Wn.2d at 394.

Although we agree with Gresham that the language, "notwithstanding Evidence Rule 404(b)," may present an apparent conflict, finding an apparent conflict does not end our analysis. We must determine whether RCW 10.58.090 and ER 404(b) can be harmonized.

Gresham contends that RCW 10.58.090 usurps a core function of the courts—regulation of the manner by which a fact finder determines guilt. He claims that it does this by reversing the judiciary's general ban on using character evidence to show guilt reflected in ER 404(b). For support, Gresham cites the centuries-old common law tradition of rejecting propensity evidence as too attenuated to be relevant or too prejudicial to be allowed in a criminal prosecution.

Gresham's argument glosses over controlling Supreme Court case law addressing the harmonizing step in our analysis. In City of Fircrest v. Jensen,[22] the court considered whether a statute governing the admissibility of blood alcohol content (BAC) test results in driving under the influence of an intoxicant (DUI) prosecutions, RCW 46.61.506(4)(a), violated the separation of powers doctrine. The statute provided, "A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of [a list of exclusive factors]." (Emphasis added.) It continued,

[22] 158 Wn.2d 384, 143 P.2d 776 (2006).

> Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.[23]

Jensen argued that the legislature impermissibly attempted to regulate court procedure by mandating admission of BAC test results once the State met its prima facie burden. The court rejected the argument, noting instead that the statute merely established reliability standards:

> [O]nce reliability of the test is established by a prima facie showing from the State, all other challenges concerning the accuracy or reliability of the test, the testing instrument, or the maintenance procedures necessarily go to the weight of the test results. That is, the trial court may still utilize the rules of evidence, including ER 702, to determine if the BAC test results will be admitted.[24]

In other words, the statute did not deprive the court of a core judicial function—the power to determine admissibility of evidence in an individual case.

Central to the court's reasoning was its decision in State v. Long.[25] In Long, the court interpreted a legislative response to an earlier court decision. This legislation made BAC test refusal evidence admissible in the State's case in chief for the purpose of inferring guilt or innocence in criminal DUI prosecutions. The court deferred to the legislature's determination that refusal evidence was relevant and admissible because the trial court retained the right in any particular

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[23] RCW 46.16.506(4)(c).
[24] Jensen, 158 Wn.2d at 397-98 (emphasis added).
[25] 113 Wn.2d 266, 778 P.2d 1027 (1989).

case to exclude refusal evidence under ER 403.[26] According to the court in Jensen, RCW 46.61.506(4)(a) was no different:

> The act does not state such tests must be admitted if a prima facie burden is met; it states that such tests are admissible. The statute is permissive, not mandatory, and can be harmonized with the rules of evidence. There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence. The legislature is not invading the prerogative of the courts, nor is it threatening judicial independence.[27]

The same analysis applies here. And since RCW 10.58.090 is permissive, preserving to the court authority to exclude evidence of past sex offenses under ER 403, Gresham's challenge to the statute fails. RCW 10.58.090(1) states, "In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403." (Emphasis added.) With this language the legislature recognized the court's ultimate authority to determine what evidence will be considered by the fact finder in any individual case. Since the statute permits, but does not mandate, the admission of evidence of past sex offenses, it does not circumscribe a core function of the courts.

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[26] Long, 113 Wn.2d at 272.

[27] Jensen, 158 Wn.2d at 399.

Ex Post Facto

Gresham's trial occurred after June 12, 2008, the effective date of RCW 10.58.090. Because Gresham committed his crimes before this date, in 1992 and from 1998 to 2002, he contends that RCW 10.58.090, as applied to him, violates the federal and state constitutional prohibitions against ex post facto laws.

Article 1, section 10 of the United States Constitution declares that "[n]o state shall . . . pass any . . . ex post facto law." Article 1, section 23 of the State Constitution reads, "No . . . ex post facto law . . . shall ever be passed." Since Washington courts have applied the federal ex post facto analysis to the state analogue, the two provisions are coextensive, and we look to federal constitutional law for guidance when we evaluate Gresham's claim.

In Calder v. Bull, the United States Supreme Court identified four categories of laws that, if applied retroactively, would constitute a violation:[28]

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.[29]

Gresham asserts that RCW 10.58.090 falls into the fourth category.

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[28] 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798).
[29] Calder, 3 U.S. at 390.

The United States Supreme Court analyzed the fourth category in Carmell v. Texas.[30] At the time that Carmell was charged with sexual abuse of a child, the applicable Texas statute required corroborating testimony to convict, unless the child victim reported the abuse within six months. Before trial, the legislature eliminated the six-month time limit, allowing a conviction on the basis of victim testimony without corroboration, regardless of when the abuse was first reported.

The court accepted Carmell's claim that the amendment unfairly reduced the quantum of evidence required to convict him. The court described the difference between laws that affect the quantum of evidence and laws that pertain to the competency of evidence:

> Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained. Prosecutors may satisfy all the requirements of any number of witness competency rules, but this says absolutely nothing about whether they have introduced a quantum of evidence sufficient to convict the offender.[31]

The court explained that the amendment did not address the competency of a child victim. The child could testify before and after the amendment. Instead, the amendment changed the quantum of evidence required for a conviction by eliminating the requirement that the state present corroborating evidence.

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[30] 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).

[31] Carmell, 529 U.S. at 546-47.

In City of Seattle v. Ludvigsen, [32] our Supreme Court adopted the Carmell analysis of the fourth Calder category. At the time Ludvigsen was charged with driving while intoxicated, the state was required to show under the per se prong that the breathalyzer machine's thermometer had been certified with a thermometer traceable to National Institute of Standards and Testing standards. In 2004, the legislature amended the statute to remove this element from the State's prima facie burden. The defendant was tried in 2005 under the new rule.

In finding that the 2004 amendments altered the quantum of evidence necessary to support a conviction, the court explained that "'ordinary' rules of evidence do not implicate ex post facto concerns because 'they do not concern whether the admissible evidence is sufficient to overcome the presumption [of innocence].'"[33] And though "it is true the [2004] amendments govern the admissibility of evidence, of greater significance is what they take away. Before the amendments, defendants could not be prosecuted, as a matter of law, based solely on evidence from a breath test that was not certified. Now they can."[34] Because the amendments changed the quantum of evidence required by law to prove an element of the charged crime, the law applied to the defendant was an ex post facto violation.

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[32] 162 Wn.2d 660, 174 P.3d 43 (2007).

[33] Ludvigsen, 162 Wn.2d at 671 (alteration in original) (quoting Carmell, 529 U.S. at 533 n.23).

[34] Ludvigsen, 162 Wn.2d at 674 (citation omitted).

Illustrating this principle by point of contrast is our Supreme Court's decision in State v. Clevenger.[35] There, the court upheld a legislative change to evidence rules that allowed one spouse to testify against the other in a criminal action if that spouse committed a crime against his or her child. The court reasoned that the change in the rules did not "'authorize conviction upon less proof, in amount or degree, than was required when the offense was committed.'"[36] Instead the statute made a witness competent to testify who was previously not competent because of marital status. Because the nature and character of the crime's underlying elements remained the same, as did the amount and degree of proof, no ex post facto violation was found.

Application of the above analysis to the present case is straightforward. RCW 10.58.090 does not alter the facts necessary to establish guilt, and it leaves unaltered the degree of proof required for a sex offense conviction. It only makes admissible evidence that might otherwise be inadmissible. For this reason, RCW 10.58.090 is like the statute at issue in Clevenger: the State still has to prove beyond a reasonable doubt all the elements of the charged crime—here, child molestation in the first degree—regardless of whether evidence was admitted under RCW 10.58.090. Because RCW 10.58.090 does not alter the quantum of

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[35] 69 Wn.2d 136, 417 P.2d 626 (1966).

[36] Clevenger, 69 Wn.2d at 142 (quoting Hopt v. Utah, 110 U.S. 574, 590, 4 S. Ct. 202, 28 L. Ed. 262 (1884)).

evidence necessary to convict, it does not violate the constitutional prohibitions against ex post facto laws.

Conclusion

Because RCW 10.58.090 violates neither the separation of powers doctrine nor the ex post facto clauses of the federal and state constitutions, we affirm.

Leach, J.

WE CONCUR:

Schindler, C.J. Cox, J.

APPENDIX B

West's RCWA **10.58.090**

C West's Revised Code of Washington Annotated Currentness
Title 10. Criminal Procedure (Refs & Annos)
Chapter 10.58. Evidence (Refs & Annos)

➡10.58.090. Sex offenses--Admissibility

(1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

(2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.

(4) For purposes of this section, "sex offense" means:

(a) Any offense defined as a sex offense by RCW 9.94A.030;

(b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and

(c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes).

(5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."

(6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

(a) The similarity of the prior acts to the acts charged;

(b) The closeness in time of the prior acts to the acts charged;

(c) The frequency of the prior acts;

(d) The presence or lack of intervening circumstances;

(e) The necessity of the evidence beyond the testimonies already offered at trial;

(f) Whether the prior act was a criminal conviction;

(g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and

(h) Other facts and circumstances.

CREDIT(S)

[2008 c 90 § 2, eff. June 12, 2008.]

HISTORICAL AND STATUTORY NOTES

Purpose--Exception to evidence rule--2008 c 90: "In Washington, the legislature and the courts share the responsibility for enacting rules of evidence. The court's authority for enacting rules of evidence arises from a statutory delegation of that responsibility to the court and from Article IV, section 1 of the state Constitution. *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975).

The legislature's authority for enacting rules of evidence arises from the Washington supreme court's prior classification of such rules as substantive law. See *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantiative law").

The legislature adopts this exception to Evidence Rule 404(b) to ensure that juries receive the necessary evidence to reach a just and fair verdict." [2008 c 90 § 1.]

Application--2008 c 90 § 2: "Section 2 of this act applies to any case that is tried on or after its adoption." [2008 c 90 § 3.]

Reviser's note: Section 2, chapter 90, Laws of 2008 was approved by the legislature on March 20, 2008, with an effective date of June 12, 2008.

West's RCWA **10.58.090,** WA ST **10.58.090**

Current with all 2009 legislation

West's RCWA **10.58.090**

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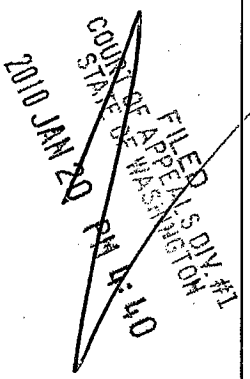

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 62862-3-I** (for transmittal to the Supreme Court) and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for ☒ **respondent: Mary Webber - Snohomish County Prosecuting Attorney,** ☒ **appellant** and/or ☒ **other party Amy Muth - Rhodes & Meryhew LLP,** ☒ **other party Suzanne Elliott – WACDL** at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.

MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 20, 2010